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HSBC BANK MALAYSIA BHD

v.

WONG THIEN BOON & ORS

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASAN LAH JCA
VINCENT NG JCA
[CIVIL APPEAL NO: W-02-72-2007]

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21 JULY 2008

CIVIL PROCEDURE: *Action - Commencement - Originating summons - Trial by way of affidavit evidence - Whether unsuitable and inappropriate when there were in existence disputed questions of fact -*

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Whether to convert summons to writ - Rules of the High Court 1980, O. 28 r. 7

The defendants claimed that the plaintiff bank owed them the sum of RM21,350 being the sum they deposited into the bank some

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27 years back and, to recover the sum, issued a notice of demand against the plaintiff pursuant to s. 218 of the Companies Act 1965. Denying liability, the plaintiff filed an originating summons claiming for declaratory relief and an injunction to restrain the defendants from presenting any winding up proceeding against it.

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The defendants retorted by filing a counterclaim, whereof the learned judge, upon the affidavit evidence adduced and the authority *inter alia* of *Tay Bok Choon v. Tahansah Sdn Bhd* (trial judge has no power to dictate what evidence a litigant should tender and cannot refuse to read affidavits which have been

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properly sworn) – dismissed the summons and allowed the counter claim. Dissatisfied, the plaintiff appealed and raised the question of whether the learned judge was entitled to proceed on the summons as he did or whether he ought, in the face of serious conflict of evidence before him, to have invoked O. 28 r. 8 of the

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Rules of the High Court 1980 ('RHC') and convert the summons into a writ.

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Held (allowing appeal and setting aside orders of learned judge)

Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) While we would agree that the authorities referred to by the defendants showed that no duty lay on the learned judge below to intervene and dictate as to how proceedings ought to have been conducted, attention must be drawn to the fact that the observation by Lord Templeman in *Tay Bok Choon* was made in the context of winding up proceedings where there is absent anything of the form of O. 28 r. 8 RHC. The other cases cited by the respondents are also unhelpful as they differed from the facts of the present case. (para 9)

(2) The learned judge had before him a serious claim by the plaintiff bank that it did not owe any monies to the defendants. The bank had produced all documents available to it given the 27 years' lapse in the defendants making their demand. Equally, on the other hand, he had before him a serious claim by the defendants that the RM21,350 was due to them. Given the material that was placed before him by way of affidavits, a conflict of evidence emerged on several issues including whether the defendants were estopped or barred from making their demand due to the operation of the equitable doctrine of laches. There also appears to be a serious dispute as to whether and if so when limitation sets in. These are matters which require full argument and mature consideration. It is therefore plain that *viva voce* evidence is necessary to determine in which direction the balance of equity would turn. (para 10)

(3) The originating summons herein should be treated as a writ. In consequence, we would remit this case to the High Court with the directions that: (i) the plaintiff shall deliver a statement of claim in proper form within 14 days hereof; (ii) the defendants shall deliver their defence and counterclaim within two weeks thereafter; and (iii) the plaintiff shall deliver a reply and defence to counterclaim not later than 25 August 2008. (para 11)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Defendan-defendan mendakwa bahawa bank plaintif telah berhutang kepada mereka sebanyak RM21,350 iaitu jumlah yang mereka depositkan ke dalam bank kira-kira 27 tahun lalu, dan
B untuk mendapat kembali jumlah tersebut, telah mengeluarkan satu notis tuntutan terhadap plaintif di bawah s. 218 Akta Syarikat 1965. Menolak liabiliti, plaintif memfail saman pemula menuntut relif deklaratori serta injunksi bagi menghalang defendan-defendan dari mengemukakan sebarang petisyen penggulungan terhadapnya.
C Defendan membalas dengan memfail tuntutan balas, dan berikutnya yang arif hakim, berdasarkan keterangan afidavit yang dikemukakan serta autoriti seperti *Tay Bok Choon v. Tahansan Sdn Bhd* (hakim bicara tidak mempunyai kuasa untuk menentukan apakah keterangan yang harus dikemukakan oleh seseorang litigan dan
D tidak boleh menolak dari meneliti afidavit-afidavit yang diikrarkan dengan sempurnanya) – telah menolak saman dan membenarkan tuntutan balas. Tidak berpuashati, plaintif merayu dan membangkitkan persoalan sama ada yang arif hakim boleh meneruskan dengan saman seperti yang dibuatnya, ataupun sama
E ada, mengambilkira kewujudan konflik keterangan yang serius di hadapannya, beliau harus menggunapakai A. 28 k. 8 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan menukar saman kepada writ.

F **Diputuskan (membenarkan rayuan dan mengenepikan perintah yang arif hakim)**
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

G **(1)** Sementara kami bersetuju bahawa autoriti-autoriti yang dirujuk defendan-defendan menunjukkan bahawa tiada tanggungjawab di pihak hakim di bawah untuk campurtangan dan menetapkan cara bagaimana prosiding harus dikendalikan, perhatian harus diambil terhadap fakta bahawa pandangan Lord Templeman di dalam *Tay Bok Choon* adalah dibuat dalam keadaan di mana
H tidak wujud peruntukan seperti A. 28 k. 8 KMT. Kes-kes lain yang dicatat oleh defendan-defendan juga tidak membantu kerana semuanya berbeza dari segi fakta dengan kes semasa.

(2) Di hadapan yang arif hakim wujud satu tuntutan serius oleh
I plaintif bank bahawa ia tidak berhutang apa-apa kepada defendan-defendan. Bank telah mengemukakan segala dokumen yang mereka ada mengambilkira masa 27 tahun yang berlalu sebelum defendan-defendan memulakan dakwaan mereka.

Begitu juga, di sebalik semua itu, wujud pula tuntutan defendan-defendan bahawa jumlah RM21,350 adalah terhutang kepada mereka. Mengambilkira material yang dikemukakan di hadapnnya melalui afidavit-afidavit, satu konflik keterangan berbangkit berhubung beberapa isu termasuk sama ada defendan-defendan diestop dari membuat tuntutan disebabkan oleh doktrin berekuiti laches. Juga terdapat pertikaian serius sama ada had masa telah menjejaskan tuntutan dan jika begitu bila. Semua ini adalah perkara-perkara yang memerlukan hujahan penuh dan pertimbangan yang semasaknya. Jelas bahawa keterangan *viva voce* adalah perlu bagi menentukan ke arah manakah imbangan ekuiti akan menuju.

(3) Saman pemula di sini hendaklah dijadikan writ. Oleh yang demikian, kami akan menghantar semula kes ini ke Mahkamah Tinggi dengan arahan supaya: (i) plaintif hendaklah menyiapserah penyata tuntutan dalam borang yang sewajarnya dalam tempoh 14 hari dari hari ini; (ii) defendan-defendan hendaklah menyiapserah pembelaan dan tuntutan balas mereka dalam masa dua minggu selepas itu; dan (iii) plaintif hendaklah menyiapserah jawapan dan pembelaan kepada tuntutan balas tidak lewat dari 25 Ogos 2008.

Case(s) referred to:

E'Singam v. Dr Sundram & Ors [1960] 26 MLJ 91 ***(refd)***

Leo Fasteners Sdn Bhd v. Wilayah Leasing Sdn Bhd [2006] 1 CLJ 121 CA ***(dist)***

Ng Wan Siew v. Teoh Sin [1963] 29 MLJ 103 ***(refd)***

Syarikat Telekom Malaysia v. Business Chinese Directory Sdn Bhd [1997] 1 CLJ 596 CA ***(dist)***

Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 PC ***(dist)***

Legislation referred to:

Companies Act 1965, s. 218

Rules of the High Court 1980, O. 28 rr. 7, 8

For the appellant - Datin Seri Jeyanthini Kannaperan (Sathya Kumardas with her); M/s Shearn Delamore & Co

For the respondents - Ben Chan (Lewis Lim with him); M/s Shyong & Wee

[Appeal from High Court, Kuala Lumpur; Originating Summons No: D8-24-368-2006]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

[2] As long ago as December 1980 the respondents (defendants in the court below) placed RM21,350 on deposit with the appellant bank (plaintiff in the court below). Some 27 years later on 11 September 2006 the defendants' solicitor issued a notice making demand of the aforesaid sum pursuant to s. 218 of the Companies Act 1965. Failure on the part of the plaintiff to comply with the demand would, of course, have meant that the defendants would have been entitled to file a petition to wind up the plaintiff bank. So, the plaintiff went into court on 2 October 2006 with an originating summons claiming, *inter alia*, a declaration that the sum claimed by the defendants was not owing by it and other consequential relief including an injunction restraining the defendants from instituting and presenting winding up proceedings. In their affidavits filed in answer to the summons the defendants raised a counter claim. They were entitled to do so under O. 28 r. 7 of the Rules of the High Court 1980. Following an exchange of affidavits, the parties presented arguments to the learned judge who heard the summons. Later, the learned judge dismissed the summons but entered judgment on the defendants' counter-claim. It is against these orders that this appeal has been brought.

[3] A number of arguments directed on the merits of the case were addressed to us by both sides. But we must be forgiven if we do not address any of them here. In our judgment this appeal turns on a short point. It is whether the learned judge was entitled to proceed on the summons as he did or whether he ought, in the face of the serious conflict of evidence before him, to have given directions for the summons to proceed as a writ action under O. 28 r. 8 of the Rules of the High Court 1980. We say this because both the claim and counter claim made by the respective parties raised matters of finality which can only be determined after a proper exchange of pleadings and after hearing oral testimony.

[4] In *E'Singam v. Dr Sundram & Ors* [1960] 26 MLJ 91 Adams J held that the originating summons procedure was unsuitable or inappropriate to determine disputed questions of fact. He then proceeded to dismiss the summons in that case. But it must be remembered that at the time the case was decided O. 28 r. 8 did

not exist. Again in *Ng Wan Siew v. Teoh Sin* [1963] 29 MLJ 103 Thompson CJ made the following observation when delivering the judgment of the Court of Appeal of the Federation of Malaya: A

> … it has been said again and again that when it is known there is going to be a conflict of testimony and a necessity for taking parol evidence the proceedings should be commenced by writ and a plaintiff if successful may be deprived of any additional costs caused by his having commenced proceedings by way of originating summons. B

[5] It is implicit in the aforesaid passage that the originating summons procedure is wholly inappropriate where there is a serious dispute of facts. C

[6] In responding to these points learned counsel for the respondents relies strongly on the decision of the Privy Council in *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 where Lord Templeman had this to say about the role of a court in civil proceedings: D

> In civil proceedings the trial judge has no power to dictate to a litigant what evidence he should tender. In winding up proceedings the trial judge cannot refuse to read affidavits which have been properly sworn, filed and produced to him unless some opposing party has applied for the attendance for cross examination of the deponent and that application has been granted and the deponent does not attend. The court cannot give a direction about evidence unless one of the litigants desires such direction to be made. Of course a judge may indicate to a petitioner that unless he calls oral evidence or applies to cross-examine the deponents of the opposition so as to prove a disputed fact, his petition is likely to fail. The judge may equally indicate to a respondent that unless he calls oral evidence or applies to cross-examine the petitioner's deponents for the purposes of disproving an allegation made by the petitioner, then the petitioner is likely to succeed. At the end of the day the judge must decide the "petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are **credibly denied** by the respondent's affidavits, then in the absence of oral evidence or cross examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts. (emphasis added.) E F G H

[7] The foregoing passage has been applied on numerous instances by our courts. See *Syarikat Telekom Malaysia v. Business Chinese Directory Sdn Bhd* [1997] 1 CLJ 596 where this court held that: I

A The principles that govern a case of this nature, where a court is called upon to make a determination based on affidavit evidence, are well settled and free from any doubt. In *Syed Ibrahim bin Syed Abdul Rahman v. Liew Su Chin* [1984] 1 MLJ 160 at p 163, Lee Hun Hoe CJ (Borneo) when delivering the judgment of the former Federal Court, said:

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> Not all disputes of fact necessarily raise serious questions to "be tried. It is of course quite right to say that it is undesirable to resolve disputes on affidavit evidence. Yet judges are expected in applying the test to be critical of the
C affidavit evidence which must on the face be at least plausible.

In *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 MLJ 433 at p 436, Lord Templeman said:

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> At the end of the day the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the
E fate of the petition by consideration of the undisputed facts.
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> ...
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> Once, as here, evidence that is *prima facie* credible has been led by one party, it is for his opponent to lead evidence to prove that
F the assertions made are not correct. The appellant, however, chose not to do so. It was content to sit back and merely ask the respondent to prove the damages. That is a risk the appellant was entitled to take. But the consequence of the appellant taking such a risk was that the respondent evidence would be believed
G by the court. And this is what happened here. The appellant cannot therefore complain if the learned judge, having satisfied himself of the credibility of the respondent's evidence, made the assessment as he did. We may add, in fairness to the learned judge in this case, that he did subject the respondent's evidence to careful scrutiny before arriving at his conclusion under each
H head of loss.

[8] And in the case of *Leo Fasteners Sdn Bhd v. Wilayah Leasing Sdn Bhd* [2006] 1 CLJ 121, 123 this court said:

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> No doubt, this is a case which the judge decided on affidavit evidence. Neither side asked to cross-examine its opponent's witnesses. In a case such as this the approach to be adopted by the primary trier of fact is that set out in the Advice of the Board of the Privy Council delivered by Lord Templeman in *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 MLJ 433 …
>
> In the instant case, there was no credible denial of the respondent's version. The judge was therefore perfectly entitled to act on it. Having done so, it would, in my judgment be wrong of us to interfere with his findings. Particularly so in this case where there has been no misdirection on the facts and no misreading of the documents.

[9] Based on the foregoing authorities counsel argued that no duty lay on the learned judge below to intervene and dictate as to how proceedings ought to have been conducted. We entirely agree. However we would also draw attention to the fact that the observation by Lord Templeman in *Tay Bok Choon v. Tahansan* was made in the context of winding up proceedings where there is absent anything of the form of O. 28 r. 8. We also find the other cases already cited above and referred to us by the respondents to be unhelpful as they differ from the facts of the present case.

[10] Here, the learned judge had before him a serious claim by the plaintiff bank that it did not owe any monies to the defendants. The bank had produced all documents available to it given the 27 years' lapse in the defendants making their demand. Equally, on the other hand he had before him a serious claim by the defendants that the RM21,350 was due to them. Given the material that was placed before him by way of affidavits a conflict of evidence emerged on several issues including, whether the defendants were either estopped or barred in making their demand due to the operation of equitable doctrine of laches. There also appears to be a serious dispute between the parties as to whether, and if so, when limitation set in. These are matters which require full argument and mature consideration. It is also plain that *viva voce* evidence is necessary to determine in which direction the balance of equity would turn. Unfortunately none of these points was considered by the learned judge. He merely addressed his mind to the affidavit evidence although allegations on the one side were credibly denied by the other. We employ the phrase "credibly denied" advisedly in view of Lord Templeman's observations in *Tay Bok Choon v. Tahansan*.

[11] For the reasons already given, this appeal must be allowed. It is. The orders of the learned judge are set aside. We direct that the originating summons to be treated as a writ and we give the following additional directions for the further conduct of the case:

(i) the plaintiff shall deliver a statement of claim in proper form within 14 days from today ie, not later than 4 August 2008.

(ii) the defendant shall deliver their defence and counterclaim within two weeks thereafter ie, not later than 18 August 2008.

(iii) the plaintiff shall deliver a reply and defence to counterclaim not later than 25 August 2008.

We remit this case to the High Court to be fixed for mention before the judge in chambers on 26 August 2008 at 9am to receive further directions from him as to the further conduct of this case including the fixing of a trial date. We also direct that an early date be fixed for the trial and disposal of the suit.

[12] We will now hear arguments on costs. Having heard arguments on costs we order that the costs of all proceedings including this appeal do follow the event of the trial. The deposit in court shall be refunded to the appellant.